

Original

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments, FM Broadcast Stations)
(Anniston and Ashland, AL, College Park,)
Covington, and Milledgeville, Georgia))

MM Docket No. 98-112
RM-9027
RM-9268

To: Chief, Allocations Branch

REPLY COMMENTS

Preston W. Small (Small), by his attorney, hereby replies to the various comments filed in the captioned docket. In reply thereto, the following is respectfully submitted:

1) WNNX's rule making petition seeks to remove existing service from 658,920 persons. WNNX's Technical Exhibit, Petition for Rule Making, p. 10. Paragraph 11 of the Notice of Proposed Rule Making (NPRM) requires WNNX to "show what areas and populations will be separately served by the allotment of Channel 261C3 at Anniston and Channel 264A at Ashland . . ." It is not apparent that WNNX's Comments respond to the Commission's inquiry. Figure 3 of WNNX's Comments, nominally titled, in part, "the Areas and Populations which will be separately served by Channel 261C3 at Anniston and 264A at Ashland," appears calculated to be responsive, however, WNNX's response presents combined, not separate, area and population figures for the two proposed fill-in stations. WNNX states that total service loss will be 658,920. However, WNNX's Figure 3 is not at all clear as to what is being counted. Figure 3 does not explicitly state

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that the proposed Anniston and Ashland stations are excluded, Figure 3 does not provide separate data for service loss in the area to be served by the proposed stations, and Figure 3 does not contain separate service figures for the two proposed stations such that it is possible to determine how many people in the loss area each station would cover. WNNX's Comments are not responsive to the Commission's request for information.

2) Figure 7 of the Technical Exhibit attached to WNNX's Petition for Rule Making indicates that there is a substantial 1 mv/m overlap between the Anniston and Ashland proposals. However, absent discrete area and population figures for each proposed station in Figure 3, there is currently an insufficient record for the Commission to determine whether the data population figure proffered in WNNX's Comments includes a double counting of persons in this overlap area such that WNNX is overstating the number of persons who would receive a replacement service if and when the two proposed fill-in stations are constructed. Again, WNNX's Comments are not responsive to the Commission's request for information.

3) Figure 3 attempts to put a good spin on the number of persons who will receive 5 or more services by claiming that 93.2% will receive 5 or more services. However, because there are 658,920 persons in WHMA-FM's service area, the 6.8% of the population which WNNX's considers is inconsequential amounts to 44,807 persons who would lose their fifth service.

4) Small's Comments at n. 19 indicated that the WNNX General Manager's October 29, 1997 letter included in WNNX's Petition for Rule Making could not be accorded any credibility because the General Manager makes a wholly unbelievable claim that College Park "is not a suburb of Atlanta." Page 1 of the General Manager's letter indicates that College Park' city manager and mayor "wish [WNNX] the best," presumably meaning to imply that College Park's officials support

WNNX's actions. The Commission must discount this statement. First, as noted above, the General Manager is not entitled to any credibility. Second, the October 30, 1997 letter from the city manager and the mayor to WNNX's General Manager does not at all indicate that College Park supports WNNX's relocation of the Anniston station. Indeed, the October 30, 1997 letter does not even indicate that College Park is even aware of any of WNNX's radio plans. Accordingly, WNNX's claim that College Park support's WNNX's proposal must be entirely discounted as the reportage of hearsay information by a witness wholly lacking in credibility.

5) The Commission should also completely discount the video tape which was attached to WNNX's Petition for Rule Making. The video tape was not made generally available to the public and thus it is not properly considered a part of the public record in this proceeding.¹ In hearing proceedings a participant must provide a transcript of the pertinent information. See 47 C.F.R. § 1.357. Instantly, WNNX has not provided a transcript of the portions of the video tape it considers to be relevant. It is unfair to WNNX to suggest that all parties must view the video tape, then draw whatever unstated conclusions WNNX expects the audience to draw, and then argue against those conclusions. Accordingly, the video tape should be stricken from consideration in this proceeding.

6) Small states in his Comments at n. 33 that "removal of Anniston's second local FM service [i.e., WHMA-FM] does not justify addition of the 38th aural signal to the Atlanta Urbanized Area." Please note that WNNX's Petition for Rule Making states that "FM station WGRW on channel 214A (90.7 MHz) and AM stations WHMA on 1390 kHz, WDNG on 1450 kHz and WANA

¹ Undersigned counsel is not aware that the Commission's Mass Media/Dockets Reference Room makes video cassette players available to members of the public. WNNX did provide a copy of the video tape to undersigned counsel. However, that does not cure the defect of it not being generally available.

on 1490 kHz are currently licensed/authorized to serve Anniston.” WNNX’s Comments erroneously claims that WANA is an FM service and that Anniston would be left with two FM and two AM services if WHMA-FM were relocated to Anniston. WNNX Comments, ¶ 3.²

7) Attachment 1 hereto is a listing of the radio stations in the Atlanta Urbanized Area which should be attributed to College Park. According to Small’s most recent count, there are forty-three (43) aural broadcast services authorized to the Atlanta Urbanized Area. There are an additional twelve services authorized in the Atlanta radio market as defined by BIA’s Radio Yearbook ‘98 which are not licensed to communities which are within the Census Bureau’s defined Atlanta Urbanized Area. Whether total number of services available in the Atlanta Urbanized Area is forty-three or fifty-five, it is clear that the Atlanta Urbanized Area is well served. The public interest would not be served by the addition of a forty-fourth or a fifty-sixth service to the Atlanta Urbanized Area where 658,920 persons in Anniston would lose existing service from the only commercial FM radio station licensed to the City of Anniston.

8) Various commenters filed comments opposing WNNX’s proposed relocation. See Comments of Jefferson-Pilot Communications Company,³ Comments of Cox Radio, Inc. The

² It is important that the sole remaining Anniston FM service would be WGRW-FM, a non-commercial operation. Thus, WNNX proposes to remove the only commercial FM service from Anniston.

³ On September 4, 1998, four days after the close of the comment period, Jefferson-Pilot filed an errata to its comments to include a table of contents and a summary; Jefferson-Pilot’s errata contained a complete copy of its August 31, 1998 Comments. Generally, the omission of the table of contents and the summary is viewed as minor and is a correctable error; such errors may be corrected in response to a motion to strike. Page America of New York, Inc., 8 FCC Rcd 4167 n. 1 (Comm’n 1993). In view of the fact that Jefferson-Pilot timely served all parties to the proceeding with its August 31, 1998 Comments and errata, and because no party or the public is prejudiced by (continued...)

commenters raised many of the same issues and pointed to many of the same problems with WNNX's proposal as did Small. Moreover, those parties raised additional factual considerations which require denial of WNNX's proposed relocation of WHMA-FM from Anniston, AL to the Atlanta Urbanized Area. Jefferson-Pilot's and Cox's comments are right on the mark and should be accorded serious consideration by the Commission.

9) Deserving of considerably less consideration, if any at all, are the Supporting Comments filed by Brantley Broadcast Associates. First, Brantley did not serve a copy of its comments upon undersigned counsel in violation of the service requirement found in the NPRM, ¶ 15.⁴ Second, Brantley's claim that "five new services . . . can be created as a direct result of the WHMA downgrade," is meritless because Brantley fails to provide any engineering for those purported new services and, more importantly, those unknown new services are not made a part of the instant proceeding by way of counterproposal. Brantley's claim that five new services could be created is merely a theoretical conjecture, not a concrete counterproposal, thus Brantley's Supporting Comments do not add any evidentiary weight to WNNX's cause. Accordingly, because of the service defect and the lack of a concrete counterproposal, no weight should be accorded to Brantley's comments.

³(...continued)
acceptance of the errata, Small supports Commission acceptance of Jefferson-Pilot's errata.

⁴ Undersigned counsel was provided with a copy of Brantley's filing by a third party who located the comments in the Commission's files. Brantley's filing does not, on its face, indicate that service upon Small was attempted. See West Hurley and Rosendale, New York, North Canaan and Sharon, Connecticut, 12 FCC Rcd 11978 n. 1 (Alloc. Br. 1997) ("Because [commenter] failed to comply with Section 1.420(a) of the Commission's Rules which requires that all pleadings be served on the petitioner, his counterproposal was dismissed in that proceeding.).

10) Finally, Small takes this opportunity to clarify a point raised in his August 31, 1998 Comments. In his Comments at footnote 6 on page 4 Small stated that WNNX's "proposed transmitter site is located within the City of Atlanta city limits. Attachment L hereto, figure 6." Small's Comments are reasonably read to mean that WNNX's coverage analysis of the Atlanta Urbanized Area was premised upon use of a particular transmitter site. Thus, while the theoretical location of a transmitter site is generally irrelevant at the allocation stage, see Randolph and Brandon, Vermont, 6 FCC Rcd 1760 (Alloc. Br. 1991) (a theoretical site is required for allocation purposes), in the instant case where WNNX argues that its proposal covers a certain fraction of a nearby urbanized area, the selection of the transmitter site becomes critical in the rule making proceeding. Moreover, there is no requirement that a successful rule making petitioner locate its transmitter site at the location specified in the rule making proposal, provided that the construction permit applications specifies 80% coverage of the city of license.⁵ Thus, if successful in the rule making, WNNX would be free to change transmitter sites to optimize its coverage of the Atlanta Urbanized Area while perhaps simultaneously affording lesser coverage, if necessary, to the proposed city of license. Accordingly, rather than consider WNNX's proposed transmitter site as a mere theoretical abstraction, under the circumstances of the instant case, it is appropriate to conclude that WNNX will locate its transmitter site within the City of Atlanta as proposed in WNNX's Petition for Rule Making.

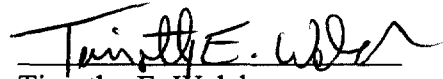
⁵ 47 C.F.R. §73.315(a) is interpreted such that 80% coverage of the city of license area or population by the 3.16 mv/m signal is substantial compliance with the rule. See e.g., Amendments of Parts 73 and 74 of the Commission's Rules To Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit, 12 FCC Rcd 12371 ¶ 11 (Comm'n 1997).

WHEREFORE, in view of the information presented herein, it is respectfully submitted that
Mr. Small's Social Circle or Covington proposals be adopted.

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September 15, 1998

Respectfully submitted,
PRESTON W. SMALL


Timothy E. Welch

His Attorney

Attachment 1--Radio Stations in the Atlanta Urbanized Area

City of License	Call Sign	Frequency
ALPHARETTA	WVNF(AM)	1400
ATLANTA	WABE(FM)	90.1
	WAEC(AM)	860
	WAFS(AM)	960
	WALR(AM)	1340
	WAOK(AM)	1380
	WCLK(FM)	91.9
	WDWD(AM)	590
	WFRG(FM)	89.3
	WGKA(AM)	1190
	WGST(AM)	640
	WGUN(AM) ⁶	1010
	WKLS(FM)	96.1
	WNIV(AM)	970
	WPCH(FM)	94.9
	WQXI(AM)	790
	WRAS(FM)	88.5
	WREK(FM)	91.1
	WSB(AM)	750
	WSB-FM	98.5
	WVEE(FM)	103.3
	WYZE(AM)	1480

⁶In the *Broadcasting Cable Yearbook 1998*, WGUN was listed under Tucker, a city within the urbanized area. The city of license, however, is Atlanta.

City of License	Call Sign	Frequency
ATLANTA (cont.)	WZGC(FM)	92.9
AUSTELL	WAOS(AM)	1600
CONYERS	WPBS(AM)	1050
DECATUR	WATB(AM)	1420
	WXLL(AM)	1310
DOUGLASVILLE	WDCY(AM)	1520
EAST POINT	WERD(AM)	1160
	WTJH(AM)	1260
FAYETTEVILLE	WHTA(FM)	97.5
GRAYSON	WPLD(AM)	610
MABLETON	WAVE(FM)	102.5 (not yet on the air)
MARIETTA	WFOM(AM)	1230
	WFTD(AM)	1080
	WGHR(FM)	102.5
	WKHX-FM	101.5
MCDONOUGH	WKKP(AM)	1410
MORROW	WSSA(AM)	1570
NORTH ATLANTA	WCNN(AM)	680
ROSWELL	WTHA(FM)	107.5
SMYRNA	WAZX(AM)	1550
SMYRNA (cont.)	WSTR(FM)	94.1

***AM Stations in the Atlanta Market but not in the Urbanized Area
(According to BIA's Radio Yearbook '98)***

City of License	Call Sign	Frequency
BUFORD	WXEM	1460
CARROLLTON	WWWE	1100
CANTON	WCHK	1290
CUMMING	WMLB	1170
GRIFFIN	WKEU	1490
NEWNAN	WCOH	1400

***FM Stations in the Atlanta Market but not in the Urbanized Area
(According to BIA's Radio Yearbook '98)***

City of License	Call Sign	Frequency
BUFORD	WLKQ	102.3
CANTON	WGST	105.7
GAINESVILLE	WFOX	97.1
	WYAY	106.7
LA GRANGE	WJZF	104.1
NEWNAN	WMKJ	96.7

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of September 1998 served a copy of the foregoing
REPLY COMMENTS by First-Class United States mail, postage prepaid, upon the following:


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